IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 60

LEANDER H. PEREZ, JR., LOUIS REICHART, GEORGE BETHEA, and EARL WENDLING,
Appellants,

versus

AUGUST M. LEDESMA, JR., HAROLD J. SPEISS, and LAWRENCE P. PITTMAN,
Appellees.

On Appeal from the United States District Court, Eastern District of Louisiana, New Orleans Division

ORIGINAL BRIEF ON BEHALF OF APPELLEES

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STATEMENT OF FACTS

Plaintiffs-Appellees are the owners and operators of a news stand in the Parish of St. Bernard, State of Louisiana. On January 27, 1969 Appellants Reichart, Bethea, and Wendling, officers in the Sheriff's Office for the Parish, entered the news stand and purchased two magazines from the adult section. After briefly reviewing the magazines at the store, they arrested Appellee Ledesma for allegedly violating State and Parish obscenity statutes. The officers then seized forty-five publications on display in the adult section of the news stand including thirty-five different titles, to be used as evidence

against Ledesma. No warrant of any kind had been applied for or obtained by the officers prior to the arrest and seizures, and no prior adversary judicial hearing on the question of the obscenity of the publications had been held prior to the arrest and seizures. No judge or magistrate had been consulted in any manner prior to the arrest and seizures. (A. 51).

According to affidavits filed by news stand owner Ledesma (A. 71) and his attorney (A. 70), which affidavits were submitted into evidence by stipulation (A. 48), the law officer in charge of the raid told Ledesma immediately after the seizure to remove the rest of the undesirable publications immediately from the premises of the news store and not display them with the implied threat of further seizures if this were not done.

The news stand owners filed an action under authority of the Civil Rights Act (42 U.S.C. §1983) and the Declaratory Judgments Act (28 U.S.C. §2201). The three-judge court below declined to grant any injunctive relief in the case (A. 96) but declared the St. Bernard Obscenity Ordinance to be unconstitutional and declared part of the State Obscenity Statute to be unconsitutional (A. 94). Both were declared to be unconstitutional on their face for overbreadth. The court below also declared unconstitutional the procedure of seizing magazines and arresting persons for selling them in the absence of an appropriate warrant and a prior adversary judicial hearing on the question of the obscenity of the publications. From this decision the St. Bernard Parish police officials have appealed.

Appellees disagree with the statement in Appellants' brief (p. 6) that Appellees "were at no time prohibited

from actively engaging in their business of selling publications, food and other items at their establishment and suffered no loss of business or income as a result of the police actions." (See Stipulation at A. 51).

SUMMARY OF ARGUMENT

1. Appellee Ledesma was illegally arrested and magazines were illegally seized from Appellees' news store because of the absolute lack of any judicial scrutiny or supervision over the seizure and arresting procedure. In the absence of an arrest warrant, search warrant, or prior adversary hearing on the question of the obscenity of the publications, inadequate procedural protection was afforded presumptively protected First Amendment materials. This is particularly true where, as here, the magazines were at a public news store so that there was no impediment of place or time to prevent the use of such reasonable protective procedure.

2. The materials seized by the police officers were substantially similar to materials recently held by this Court to be not obscene as a matter of law, and the manner of dissemination of the materials at the news store created no compelling state interest in suppressing that dissemination.

3. The court below exercised proper discretion in ordering materials seized to be returned to the newsdealers and suppressed as evidence in any criminal trial. Such orders were reasonable and necessary to affectuate the declaratory judgment of the court, and such judgment was mandated by this Court in *Zwickler v. Koota*, 389 U.S. 241 (1967). Further, the

Federal Civil Rights Act is one of the exceptions alluded to in the Federal Anti-Injunction Act. For the same reasons, the court below properly declared the St. Bernard Parish Obscenity Ordinance to be unconstitutional.

I.

ARREST OF A NEWS STORE OPERATOR AND SEIZURE OF HIS MAGAZINES AS EVIDENCE OF OBSCENITY BY STATE OFFICIALS IN THE ABSENCE OF PRIOR JUDICIAL SCRUTINY VIOLATES THE FIRST, FOURTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The arrested Appellee in this case, August Ledesma, was the operator of a newsstore. The newsstore was open to the public, and girlie magazines were kept in an area restricted to adults (A. 72-73). The St. Bernard Parish police officials who arrested him, seized forty-five magazines from his store, and charged him with obscenity, did so in the absence of any judicial scrutiny or supervision whatsoever. No arrest warrant or search warrant was obtained, although there was no reason why they could not have been issued if the facts warranted it. No adversary hearing on the question of the obscenity of the publications was afforded Ledesma. He was simply arrested and his magazines seized because St. Bernard deputy sheriffs, in their wisdom, decided that the magazines were obscene.

A. The Necessity for Judicial Scrutiny Before Seizure.

In *Marcus v. Search Warrant of Property*, 367 U.S. 717 81 S. Ct. 1708, 6 L. Ed. 2d 1127, and *Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 84 S. Ct.

1723, 12 L. Ed. 2d 809, this Court held that publications such as the magazines involved in this case are entitled to special procedural safeguards which do not apply to ordinary "contraband". These procedural safeguards, as enunciated by this Court, include the right to a prior adversary judicial hearing before seizure on the issue of obscenity and the issuance of a proper warrant which does not leave to the discretion of the police officer the decision as to what is to be seized as obscene. The two cases were civil cases in which the State sought to suppress allegedly obscene publications by forfeiture. However, this Court did not limit its holding to civil cases when it said:

> "It is no answer to say that obscene books are contraband, and that consequently the standards governing searches and seizures of allegedly obscene books should not differ from those applied with respect to narcotics, gambling paraphernalia and other contraband. We rejected that proposition in *Marcus*.
>
> . . . . .
>
> "For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgment of the right of the public in a free society to unobstructed circulation of non-obscene books."
>
> *A Quantity of Copies of Books v. Kansas*, 378 U.S. at 213.

Since the decisions in *Marcus* and *Quantity of Copies of Books*, six Federal Circuit Courts of Appeal have held that law enforcement officials cannot seize allegedly obscene materials in criminal cases in the absence of a prior adversary hearing on the question of the obscenity

of the material. The cases, all involving allegedly obscene movies, are:

2nd Circuit:

Bethview Amusement Corp. v. Cahn, 416 F. 2d 410 (1969) cert. denied 2-27-70 Case No. 1034.

3rd Circuit:

Cambist Films v. Duggan, 420 F. 2d 687 (1969).

4th Circuit:

Tyrone, Inc. v. Wilkinson, 410 F. 2d 639 (1969).

7th Circuit:

Metzger v. Pearcy, 393 F. 2d 202 (1968).

8th Circuit:

U.S.A. v. Alexander, No. 19757, decided May 22, 1970.

9th Circuit:

Demich, Inc. v. John J. Ferdon, et al, No. 24959, decided May 13, 1970.

The following decisions rendered by three-judge federal district courts empaneled pursuant to 28 U.S.C. §2281 and §2284 have held that the Constitution requires an adversary hearing to determine the question of obscenity before seizure: *Morrison v. Wilson*, 307 F. Supp. 196 (N.E.Fla. 1969) (publication); *Carter v. Gautier*, 305 F. Supp. 1098 (M.D. Ga. 1969) (motion picture film); *Delta Book Distributors, Inc. v. Cronvich*, 304 F. Supp. 662 (E.D. La. 1968) (publication); *Cambist Films, Inc. v. Tribell*, 293 F. Supp. 407 (E.D. Ky. 1968) (motion picture film); *Fontaine v. Dial*, 303 F. Supp. 436 (W.D.

Tex. 1969) (motion picture film). An excellent analysis of the issues involved in this case was included in the three-judge court decision in *Entertainment Ventures, Inc. v. Brewer*, 306 F. Supp. 802 (M.D. Ala. 1969), which held that some form of prior judicial scrutiny, though not necessarily an adversary hearing, was required prior to seizure. The latest three-judge court decision recognizing this principle was *Russ Meyer, et al v. T. Edward Austin, et al* (No. 69-678-CIV-J, U.S.D.C., Mid. Dist. Fla., Judy 22, 1970).

The following is a compilation of decisions rendered by United States District Courts holding that a prior adversary hearing is mandated by the Constitution in the area of First Amendment freedoms: *Poulos v. Rucker*, 288 F. Supp. 305 (M.D. Ala. 1968) (publications); *City News Center, Inc. v. Carson*, 298 F. Supp. 706 (M.D. Fla. 1969) (publication); *Sokolic v. Ryan*, 304 F. Supp. 213 (S.D. Ga. 1969) (books, magazines and movie film); *Cambist Films, Inc. v State of Illinois*, 292 F. Supp. 185 (N.D. Ill. 1968) (motion picture film); *Wilhelm v. Turner*, 298 F. Supp. 1335 (S.D. Iowa 1969) (newspaper); *Bee See Books, Inc. v. Leary*, 291 F. Supp. 622 (S.D. N.Y. 1968) (Rule recognized); *Gregory v. DiFlorio*, 298 F. Supp. 1360 (W.D. N.Y. 1969) (books); *United States v. Brown*, 274 F. Supp. 56 (D.D. N.Y. 1967) (magazines); *Drive In Theatres, Inc. v. Huskey*, 305 F. Supp. 1232 (W.D. N.C. 1969) (motion picture film); *Leslie Tobin Imports, Inc. v. Rizzo*, 305 F. Supp. 1135 (E.D. Pa. 1969) (posters and buttons); *Overstock Book Co., Inc. v. Barry*, 305 F. Supp. 842 (E.D. N.Y. 1969); (books); *Central Agency, Inc. v. Brown*, 306 F. Supp. 502 (N.D. Ga. 1969) (motion picture film); *HMH Publishing Co., Inc. v. Oldham*, 306 F. Supp. 495 (M.D. Fla. 1969) (magazines); *Tyrone*,

Inc. v. Wilkinson, 294 F. Supp. 1330 (E.D. Va. 1969) (motion picture film).

The foregoing authorities clearly demonstrate that the First, Fourth, and Fourteenth Amendments compel more restrictive rules in cases in which seizures are related to alleged obscenity than in ordinary cases where the seizure is made incident to a lawful arrest. The Appellants argue that newsstore owner Ledesma was arrested for a misdemeanor committed in the presence of the officers, and such officers were under a duty to take possession of the existing physical evidence of the offense without a warrant or without the necessity of any type of prior adversary judicial hearing. It is incongruous to condemn, as vesting too abundant authority in the enforcing officer, a search and seizure made on an overly broad warrant, as this court did in *Lee Art Theatres, Inc. v. Virginia*, 392 U.S. 636, while permitting officers an unfettered discretion in seizures effected without a warrant under the guise of being incident to arrest. See *Cambist Films v. Duggan*, 420 F. 2d 687 (3rd Cir., 1969).

B. The Necessity for Judicial Scrutiny Before Arrest.

The Court below condemned not only the seizures but also the arrest in the absence of providing adequate protection for presumptively non-obscene materials:

> "Since prior restraint upon the exercise of First amendment rights can be exerted through seizure (with or without a warrant) of the allegedly offensive materials, arrest (with or without a warrant) of the alleged offender or through the threat of either or both seizures and arrests, the conclusion is irresistable and logic and in law that none of these may be constitutionally un-

> dertaken prior to an adversary judicial determination of obscenity." (A. 88-89)

No prior judicial scrutiny, even by way of arrest warrant, was present in this case. See e.g., *Entertainment Ventures, Inc. v. Brewer,* 306 F. Supp. 802 (three-judge court, N.D. Ala. 1969). There was no impediment to the St. Bernard Parish officers obtaining an arrest warrant, if the facts otherwise warranted its issuance. The news stand involved was open to the public, and the officers had previously visited it.

The Fourth Amendment is not limited to seizures of personal effects, but provides that "the right of the people to be secure in their *persons*. . . . against unreasonable seizures shall not be violated," and further provides that warrants must particularly describe the "persons . . . to be seized."

Thus,

> "The Fourth Amendment guarantees the right of the individual to be secure against unreasonable arrests as well as against unreasonable search of houses and seizure of papers and effects."
>
> *Worthington v. U.S.*, 166 F. 2d 557

A critical question before this Court is whether the arrest in this case was unreasonable because, made without a warrant or judicial scrutiny, such procedure does not adequately safeguard against the suppression of non-obscene books. This Court has held that books cannot be placed in the same category as gambling paraphernalia and other contraband for purposes of search and seizures. Yet it is not the personal effects (non-obscene books)

themselves that the Court was primarily concerned about, but the right of the public to read non-obscene books. It is submitted that the seizure of persons is as relevant to this concern as the seizure of papers and effects. Just as books are not in the same category as gambling paraphernalia, so arrests for the sale or possession of books are not in the same category as arrests for possession of gambling implements.

Certainly an arrest may present as much "danger to abridgment of the right of the public in a free society to unobstructed circulation of non-obscene books." (A Quantity of *Copies of Books*, at 378 U.S. 205, 213) as seizure of the books themselves. It is submitted that the entire thrust of the cases decided by this Court in this area is that *the policeman on the beat should not be allowed to determine what is obscene or not obscene because if given this authority he can—and very likely will—obstruct the circulation of non-obscene books.* Thus the requirements for a prior adversary hearing before seizure and a search warrant. Is it any more reasonable to permit that same policeman or, in this case, a deputy sheriff from St. Bernard Parish, to pay $2.00 for a magazine and then exercise his opinion that it is obscene by arresting the vendor? Is not the same danger to free speech present in this case as would be present if the policeman could seize the magazines without prior judicial scrutiny? He is a rare newsdealer who will continue to sell copies of a magazine after he or some fellow newsdealer has once been arrested for selling it, for such action on his part would most certainly invite arrest. To prevent such arbitrary arrests by policemen on obscenity charges, an arrest warrant should be obtained from a judicial officer. In the absence of such a warrant the arrest must be unreasonable, and thus illegal.

C. The Nature of and Necessity for a Prior Adversary Judicial Hearing.

This Court is well aware of the difficulties encountered by conscientious newsdealers in determining which materials enter that gray area in which some courts and many policemen see only obscenity. *Smith v. California*, 361 U.S. 147, 80 S. Ct. 215 (1959). Even courts have expressed strong differences of opinion on this question. Circuit Judge Matthes of the 8th Circuit has recently pointed out:

> "The assumption that there is a consensus among reasonable men as to the identity of 'hard-core pornography', therefore diminishing the danger of suppressing protected speech, may be questioned. We note that one federal district court in Mississippi found the film "The Fox" to be not obscene, while another federal district court in that state thought the film to be 'hard-core pornography.' Compare *Camise v. Douglas*, N.D. Miss. December 3, 1968, No. EC 6872-K, with *McGrew v. City of Jackson, supra.* We are led to assume that even more disagreement would arise among police officers and magistrates as to what constitutes 'hard-core pornography', when the decision is made without benefit of an adversary hearing. Such uncertainty can only lead to the suppression of protected speech."
>
> *U.S.A. v. Ferris J. Alexander, et al*, U.S.C.A. 8th Cir., No. 19,757, decided May 22 ,1970 [The quoted material is from footnote 7, page 10 of Slip Opinion]

Thus,

> "The very purpose of the prior hearing is to provide the sensitive tool for determination of the expression's legitimacy before imposition of substantial restraints."
>
> [Citations omitted]
> *U.S.A. v Alexander, supra,* page 10 of Slip Opinion.

The complexities involved have brought more and more lower courts to recognize that:

> " . . . probable cause as to whether obscenity exists has come to be recognized as a matter of *constitutional judgment.* [Emphasis by the Court], unique in the law because of the fragile nature of the right protected, and incapable of determination by a policeman, grand jury, or judge acting ex parte, without a prior finding of probable cause in a judicially supervised adversary hearing."
>
> *City News Center, Inc. v. Dale Carson,* U.S.D.C., Mid. Dist. Fla., 310 F. Supp. 1018, 1021 (1970).

It was perhaps through a recognition of such facts of life in this area of the law that the court below held:

> "It is left to those states seeking to regulate obscenity to devise constitutionally acceptable procedures for the enforcement of any such regulation. However, these procedures, among others, may have to incorporate provisions immunizing alleged violators from criminal liability for any activities occurring prior to an adversary judicial determination of the fact of obscenity." (A. 90)

It is submitted that this Court should take this op-

portunity to affirm that the true value of the prior adversary judicial hearing in obscenity cases does not lie in its use as an adjunct to proposed criminal prosecution, but rather it is the only fair method of giving newsdealers reasonable notice as to what materials they can safely handle. This position has been adopted by some lower courts. Judge Walter E. Craig, of the United States District Court for the District of Arizona and former president of the American Bar Association, has recently held:

> "This Court is in agreement with the principle adopted in *Delta*, *supra*, that '[t]he dissemination of a particular work, which is alleged to be obscene should be completely undisturbed until an independent determination of obscenity has been made by a judicial officer, including an adversary hearing. [Citation omitted.]' at page 667 (quoting from *Cambist Films, supra)*. Such a procedure should provide for immunizing alleged violators from criminal liability prior to an adversary judicial determination of the fact of obscenity. *Delta, supra.*"
>
> *Robert Krahm v. Milton Graham*, U.S.D.C. Ariz., No. CIV-69-392 Phx. WEC, February 12, 1970 [Page 6 of Slip Opinion].

See also *Goodwin v. Morris*, 3 judge court, N.D. Ohio, No. C 70-19, March 18, 1970, recognizing the principle that alleged violators of obscenity laws in book and magazine cases must be immunized from criminal liability for activities occurring prior to an adversary judicial determination of the fact of obscenity. This principle of law is, it is submitted, most compelling in a fact situation such as is presented to the Court in the case

at bar. Appellee Ledesma, the operator of a newsstore, was not secreting his materials from the police. There was no factual impediment in this case to prevent the holding of such a hearing.

Because of the lack of any prior judicial scrutiny, through an arrest warrant, search warrant, or prior adversary judicial hearing on the question of the obscenity of the magazines, the arrest and seizures by Appellants violated Appellee's rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution.

II.

THE PUBLICATIONS IN QUESTION ARE NOT OBSCENE AS A MATTER OF LAW. THE STATE HAS NO COMPELLING INTEREST IN PREVENTING THEIR LIMITED DISTRIBUTION (1) TO ADULTS ONLY, (2) ABSENT PANDERING, AND (3)ABSENT OBTRUSIVE DISPLAY IN SUCH MANNER AS TO OFFEND OTHERS.

The magazines at issue in this case were forwarded for this Court's observation by Appellants. Appellees submit that the magazines are substantially similar to those publications found not to be obscene by this Court as a matter of law in *Bloss, et al v. Dykema*, October Term, 1969, No. 1347, 26 L. Ed. 2d 230.

Appellee Ledesma's affidavit (A. 71), admitted into evidence below (A. 48), affirmed that at the time of Ledesma's arrest it was the policy of the newsstore to:

> "(a) refuse to sell or display to juveniles any nudist or girlie magazines of the type seized by the police officers on January 27, 1969, (b) [to] display the said magazines only in a restricted

> area removed from the sight of the general public, and (c) [to] refuse any lurid advertising of the said magazines. In furtherance of this policy signs restricting the display area of these magazines were kept in the store at all times and minors were forbidden to go into the area prohibited by the signs." (A. 72-73)

Photographs attached to Ledesma's affidavit and described therein (A. 73) portraying the restricted areas in which the magazines were sold were lost below after their admission into evidence (A. 74). Although Appellants have filed into the record affidavits alleging that minors were in the restricted area of the newsstore several weeks after Ledesma's arrest, there is nothing in the record from below to contradict the aforementioned facts alleged by Ledesma as true at the time of his arrest.

The President's Commission on Obscenity and Pornography has clearly demonstrated the lack of a compelling state interest in prohibiting the mere possession or consensual sale to adults of even admittedly pornographic materials. The restriction of freedom of speech through such prohibition cannot be justified in the absence of a compelling interest on the part of the state. In view of Appellee Ledesma's careful and restricted manner of dissemination of the materials prior to and at the time of his arrest, the state had no compellling interest which justified invading Ledesma's freedom of speech. Certainly there was nothing to "overbalance" his right to exercise freedom of speech in the manner in which he chose to exercise it. See: *Stanley v. Georgia*, 394 U.S. 557 (1969); *Karalexis v Byrne*, U.S.D.C. Mass., now on appeal to this Court as *Byrne v. Karalexis*, No. 83 O.T. 1970; *U.S.A. v. Thirty Seven Photographs*,

U.S.D.C. Cent. Dist. Cal., CA No. 69-2242-F, 38 L.W. 2240 (1970)

III.

THE THREE-JUDGE COURT BELOW PROPERLY EXERCISED ITS DISCRETION IN GRANTING THE RELIEF IN PARAGRAPHS 1 AND 2 OF ITS JUDGMENT OF AUGUST 14, 1969, IN VIEW OF THE PENDENCY OF THE STATE PROSECUTION CHARGING VIOLATION OF REVISED STATUTE 14:106.

The court below "decline[d] to grant any injunctive relief" with regard to Plaintiff-Appellee's request to enjoin Defendants from proceeding with the pending prosecution, instituting new prosecutions, or undertaking further seizures or arrests (A. 96, 97). The judgment below ordered:

> "3. That the preliminary and permanent injunctions prayed for be denied," (A. 107).

The court nonetheless granted declarative relief, declaring the St. Bernard Parish Ordinance and part of the State Obscenity Statute to be unconstitutional *on their face* for *overbreadth* (A. 94-96). The court further declared the procedure of arresting persons and seizing magazines in the absence of a prior adversary judicial hearing to be unconstitutional (A. 90). In paragraphs 1 and 2 of its judgment the court ordered that all seized materials be returned to those from whom they were seized and suppressed as evidence in pending or future prosecutions of the news store owners (A. 97).

A. The Declarative Relief and Order to Effectuate That Relief Were Proper.

This Court has held that whether the jurisdiction to enter a declaratory judgment is to be entertained rests

in the exercise of discretion by the *trial* court, *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 72 S. Ct 219, and it is established that the trial court's decision will not be disturbed on appeal in the absence of a clear showing of abuse of that discretion. *St. Paul Mercury Insurance Co. v. Huitt*, 336 F. 2d 37 (6th Circuit.)

If a trial court really is to have some discretion in the area of declaratory judgments, then certainly such discretion was properly exercised by entertaining jurisdiction in this case. There is no queston but that the plaintiffs below had standing and a case or controversy existed, and there is no legislative mandate (including, by its very words, the Federal Anti-Injunction Statute, 28 U.S.C. §2283) preventing the Court from entertaining jurisdiction. To hold that the court below abused its discretion by not abstaining would really be a declaration that in fact the court below has no discretion, that the congressional mandate expressed in the Federal Declaratory Judgments Act (28 U.S.C. §2201) is to be frustrated, and federal courts are to be relegated to a secondary and less than equal position as protectors of federal constitutional rights.

In *Zwickler v. Koota*, 389 U.S. 241 (1967) this Court laid down these guidelines: federal courts were to treat the demands for declaratory judgment and injunctive relief separately; a court could grant declaratory relief even though injunctive relief was not justified, and the fact that a prayer for declaratory relief was coupled with a prayer for injunctive relief did not alter the rule. Abstention was not proper when a state statute regulating expression was justifiably attacked as constitutionally overbroad; in that case, the lower court should grant

declaratory relief even if injunctive relief was not merited. 389 U.S. 241, 254 .

Circuit Judge Thornberry read *Zwickler* accurately when he held, in a case in which the request for declaratory judgment was made during the pendency of a state court prosecution:

> "The Court [in *Zwickler*] emphasized the special duty of federal courts to vindicate federal rights, especially when the challenge is that a statute on its face is repugnant to the First Amendment. Id., 88 S. Ct. at 395. The court squarely held that the abstention doctrine is inappropriate for cases in which the statute is justifiably attacked on its face for an 'overbreadth' that abridges free expression. Id., 88 S. Ct. at 396, 399."
>
> *Davis v. Francois*, 395 F. 2d 730, 732 (5th Cir., 1968)

The Declaratory Judgments Act provides that a federal court, after granting a declaratory judgment, may give "further necessary or proper relief" to the litigant who prevails. The court below did this by ordering a return of the materials seized and ordering their suppression as evidence in any prosecutions of the news dealers. This order complementing the declaratory judgment was reasonable and necessary to effectuate the judgment that the arrest and seizures were illegal. The court did not tell the defendants below that they could not proceed with their prosecution, and in fact specifically declined to do so, but the court asserted its prerogative as a court designed to protect federal constitutional rights by determining what was to happen to the magazines. The news store owners, two of whom were not be-

ing prosecuted in state court, properly asked that the federal court order the return of their illegally seized magazines, and the court below properly ordered their return.

B. The Civil Rights Act is One of the Exceptions Mentioned in the Federal Anti-Injunction Statute, Since the Civil Rights Act Authorizes An Injunction And Such Is "Expressly Authorized By Act of Congress."

It is submitted that it is not necessary to reach the applicability of the Anti-Injunction Statute (28 U.S.C. 2283) to the Civil Rights Act (42 U.S.C. 1983) in this case, since the state proceedings were not enjoined. However, should this Court decide that the relief in paragraphs 1 and 2 of the judgment below constitute "an injunction to stay proceedings" in the State court, then it is further submitted that the action below was proper because the Civil Rights Act is an Act of Congress expressly authorizing such an injunction.

In *Amalgamated Clothing v. Richman Brothers*, 348 U.S. 511 (1955), this Court held that a statute could "expressly" authorize an exception to the Anti-Injunction Act even though the statute did not by its terms refer to the act. 348 U.S. at 516. The Civil Rights Act (42 U.S.C. §1983) provides for a "suit in equity," and, after all, what is a suit in equity but a request for an injunction? See also: *Dilworth v. Riner*, 343 F. 2d 226 (5th Cir., 1965); *Leiter Minerals, Inc. v. United States*, 352 U.S. 220.

An examination of the purpose sought to be achieved by the enactment of §1983 leads to the conclusion that it must be read as an exception to §2283. 42 U.S.C.

§1983 is derived almost intact from §1 of the 1871 "Act to Enforce the Fourteenth Amendment." The Reconstruction Congresses were concerned not only with protecting the civil rights of the newly enfranchised citizenry but also with insuring that the Federal Government be given the principal responsibility for this protection. The Congresses had also passed the Thirteenth, Forteenth, and Fifteenth Amendments, which the Court said in *Strauder v. West Virginia*, 100 U.S. 303, 306-307, had a common purpose, namely to secure rights to the recently emancipated slaves. See *Ex Parte Virginia*, 100 U.S. 339.

The legislative history of §1983 indicates that it was enacted to protect the rights of those newly freed and to grant them access to federal courts for the protection of those rights. See Note, *The Dombrowski Remedy —Federal Injunctions Against State Court Proceedings Violative of Constitutional Rights*, 21 Rutgers L. Rev. 92, 109-113; *Monroe v. Pape*, 365 U.S. 167, 180; *Landry v. Daley*, 288 F. Supp. 200, (N.D. Ill. 1968). If 42 U.S.C. §1983 is not regarded as an exception to §2283, the statutory scheme for the protection of constitutional rights would be rendered nugatory whenever state action falling within the ban of §1983 took the form of a legal proceeding. A claimant alleging applicability of "the Dombrowski Doctrine", *Dombrowski v. Pfister*, 380 U.S. 479, usually will not be able to present a "case or controversy" unless prosecution is threatened, and in the great bulk of the cases the threat of prosecution will not manifest itself until charges have been filed. Thus as a practical matter the Dombrowski doctrine is essentially valueless unless it may be applied to pending prosecutions in state courts. It is submitted that Judge Wisdom of the 5th Circuit was correct when he found in his concurring opinion in *Ware v. Nichols*, 266 F. Supp. 564 (N.D. Miss. 1967) that §1983 was an express ex-

ception to the Anti-Injunction Act because §1983 represented federal interposition under the Supremacy Clause to protect individuals from state denial of their constitutionally protected rights. 266 F. Supp. at 570.

Undersigned counsel had the pleasure of representing several successful appellants in the Fifth Circuit in a case where the petitioners in their removal petition had alleged, *inter alia* that the state statute under which they were being prosecuted was unconstitutionally vague on its face. However, when that case reached this Court the Fifth Circuit's grant of the removal petition was reversed, *City of Greenwood v. Peacock*, 384 U.S. 808, this Court holding at page 829:

> "But there are many other remedies available in the Federal Courts to redress the wrongs claimed by the individual petitioners in the extraordinary circumstances they allege in their removal petitions. If the state prosecution or trial on the charge of obstructing a public street or on any other charge would itself clearly deny their rights protected by the First Amendment, they may under some circumstances obtain an injunction in the Federal Court. See *Dombrowski v. Pfister*, 380 U.S. 479."

This Court thus recognized that in the circumstances of that case (where removal was obviously sought after the state prosecutions had commenced), a federal injunction would be a remedy available to petitioner. The four dissenting justices explicitly recognized that a federal court could enjoin pending state prosecutions:

> "Continuance of an illegal local prosecution, like the initiation of a new one, can have a chilling effect on a federal guarantee of civil rights.

We said in *N.A.A.C.P. v. Button*, 371 U. S. 415, 433, respecting some of these federal rights, that '[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.' In a First Amendment context we said: 'By permitting determination of the invalidity of these statutes without regard to the impermissibility of some regulation on the facts of particular cases, we have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.' *Dombrowski v. Pfister*, 380 U.S. 479, 487. The latter case was a suit to enjoin a state prosecution. The present cases are close kin. For removal, if allowed, is equivalent to a plea in bar granted by a federal court to protect a federal right." 384 U.S. at 845-846.

IV.

THE THREE-JUDGE COURT BELOW PROPERLY EXERCISED ITS DISCRETION IN GRANTING THE RELIEF IN PARAGRAPH 4 OF THE JUDGMENT OF AUGUST 14, 1969, DECLARING THE ST. BERNARD PARISH OBSCENITY ORDINANCE TO BE UNCONSTITUTIONAL.

Appellees argument favoring the decision by the court below to declare the St. Bernard Ordinance unconstitutional is substantially the same as appears in the immediately preceding argument regarding the declaration of unconstitutionality of the state obscenity statute.

However, with regard to this question, which was

specially posed for the parties by the Court, Appellants point out in their brief that prior to the hearing below a *nolle prosequi* had been entered in the charges against Appellee Ledesma relative to the Parish ordinance, terminating the prosecution thereunder. (Appellants' brief, p. 26). Therefore, Appellants contend, at the time of trial there was no "controversy of sufficient immediacy and reality to warrant a declaratory judgment." (Brief, p. 26). This argument demonstrates clearly how the Appellants would remove federal courts from protecting federal rights. If no charge is pending in state court against a defendant, there is simply no case or controversy to warrant his obtaining a declaratory judgment. On the other hand, if a case is pending against him, the federal court should abstain and let the matter proceed in state court. It is submitted that federal courts do have a role in protecting rights guaranteed by the Federal Constitution, and the court below recognized that fact.

CONCLUSION

It is submitted that Appellants' actions in arresting Appellee Ledesma and seizing dozens of magazines owned by Appellees, without having first obtained a search warrant or arrest warrant, and without there having first been held a prior adversary judicial hearing on the question of the obscenity of the publications, constituted clear violations of Appellees' rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution. The court below was correct and exercised proper discretion in declaring the State statute and St. Bernard Parish ordinance to be unconstitutional, and was further correct and used proper discretion in declaring the procedures used by Appellants to be unconstitutional

and in rendering necessary orders to effectuate its judgment. The magazines possessed and sold by Ledesma were not obscene as a matter of law, and Ledesma was protected in the manner of usage and dissemination of his publications by the First and Fourteenth Amendments to the United States Constitution. For the foregoing reasons the judgment below should be affirmed or modified in such manner as to grant Appellees injunctive relief from those acts declared by the court below to be unconstitutional.

Respectfully submitted,

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PROOF OF SERVICE

I, Jack Peebles, attorney for Appellees herein, hereby certify that I have served three copies of the foregoing original brief on behalf of Appellees upon Appellants herein, by mailing same, postage prepaid, to their counsel of record, Charles H. Livaudais, 2006 Packenham Drive, Chalmette, Louisiana 70043, prior to the filing thereof in the United States Supreme Court.

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